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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-493

CARL OSLIN RAMZY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

CARL OSLIN RAMZY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not been reported in a bound volume. It is Opinion Number 31136 and is appended hereto (Appendix A), along with the judgment (Appendix B) and the order denying rehearing (Appendix C).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 16, 1971. (Appendix B).

A Petition for Rehearing was denied on September 9, 1971. (Appendix C). The mandate of the Court was stayed until October 9, 1971, and the stay will continue until final disposition of this Petition.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The Petitioner's trial counsel should make the determination whether or not certain material excised from the government's file would be helpful to the defense.

The jury should have been instructed that evidence of good character, when considered with all the evidence, could be sufficient alone to create a reasonable doubt.

The jury should have been instructed that the failure of the government to call witnesses peculiarly within its control results in an inference that such testimony would be unfavorable to the government's case.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America, Fifth Amendment:

> "* * * nor shall any person * * * be deprived of life, liberty or property, without due process of law * * *".

STATUTORY PROVISIONS INVOLVED

12 U.S.C.A. 331:

"The following acts and the causing thereof are prohibited:

(q) (2) the sale, delivery, or other disposition of a drug in violation of Section 360 a (b) of this title." (Repealed by 21 U.S.C.A. 801 et seq, October 27, 1970).

21 U.S.C.A. 360 a (b):

"No person, other than

(1) a person described in subsection (a) of this section, while such person is acting in the ordinary and authorized course of his business, profession, occupation or employment or

(2) a common or contract carrier or warehouseman, or an employee thereof, whose possession of any depressant or stimulant drug is in the usual course of his business or employment as such,

shall sell, deliver or otherwise dispose of any depressant or stimulant drug to any other person.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of the first instance was three alleged violations of a federal criminal statute. (21 U.S.C.A. 302).

The government first learned of drug traffic in the Jacksboro, Texas, area in July, 1969, after Neal Pierce, a Jacksboro service station operator, turned some pills over to Jacksboro Police Officer Epps, who subsequently contacted the federal authorities. In September, 1969, a purchase of drugs was attempted. A federal undercover agent went to

Jacksboro on October 1, 1969, where Mr. Pierce tried to arrange a meeting between the agent and the Petitioner, Dr. Ramzy. The first phone call was unsuccessful, but the second one resulted in a meeting in which the agent purchased controlled drugs from Dr. Ramzy. The agent kept in contact with Dr. Ramzy over the next eight months with subsequent purchases of drugs on October 21, 1969, and May 13, 1970. Dr. Ramzy admitted the sales, but injected the defense of entrapment, testifying that he had been contacted many times by Neal Pierce to purchase drugs and that the undercover agent threatened to expose alleged sales to Pierce and another man if the doctor refused to make the sales. The doctor's office staff testified that they received many phone calls from the agent and Neal Pierce. Dr. Ramzy offered strong good character evidence, with the mayor of Jacksboro, the sheriff and deputy sheriff of Jack County, Texas, and the administrator of the Jack County Hospital, among others, testifying.

A jury found Dr. Ramzy guilty on each count of the three count indictment on December 1, 1970. Notice of Appeal was filed and the cause was properly presented to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S APPEAL

A.

The pre-trial motion for discovery was granted, the trial court entering an oral order directing the United States Attorney to turn over his file to the defense. During the trial it became apparent that certain evidence had been

kept from the defense. A *Brady v. Maryland*[1] motion was then filed. The government's file was given to the trial court for an en camera inspection. The trial court granted discovery as to some of the withheld evidence and denied discovery to some of the evidence. Petitioner excepted on the ground that it was the defense attorney who should make the determination whether the withheld evidence was helpful to the defense.

The court of appeals held that the withheld material contained "nothing that could possibly have materially aided the defendant in the preparation of the case."

Suppression of evidence favorable to an accused upon request violates due process of law where the evidence is material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194. The reasoning in *Dennis v. United States*, 384 U.S. 855, 16 L. Ed. 2d 973, 86 S. Ct. 1840 (involving the withholding of grand jury testimony) is applicable to the present situation. The opinion stated that in an adversary system, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts — exceptions are only justifiable by the clearest and most compelling considerations. The opinion further stated the trial court should not be burdened with the task or responsibility of examining voluminous records because of the difficulty involved and the unrealistic assumption that the trial court's judgment, however conscientiously made, would exhaust the possibilities of use to

[1] See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215.

the defense. "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 384 U.S. at 875; 86 S. Ct. at 1851.

Also relevant is *Alderman v. United States*, 394 U.S. 165, 22 L. Ed. 2d 176, 89 S. Ct. 961, (discussing the right of the accused to examine unconstitutionally seized evidence for a fatal taint), where the opinion stated:

> "An apparent innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life.
>
> "And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all the relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex and the margin of error too great to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the government's case."

The Petitioner states that his trial attorney was the only officer of the Court who was capable of determining what evidence is material to the defense.[2] Further, he strongly contends that the relevance of the evidence withheld was for defense counsel's determination only, and the failure of the trial court to so hold was a denial of due process.

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[2] As stated in *Alderman*, supra, the defendant and his counsel could be placed under enforceable order against unwarranted disclosures, orders which can be expected to be strongly enforced. 394 U.S. at 185, 89 S.Ct. at 972-973.

B.

Petitioner requested that the jury be instructed that evidence of his good character could give rise to a reasonable doubt.[3] The trial court instructed that the jury should acquit if the character evidence, along with all other evidence in the case created a reasonable doubt.[4] The Circuit Court of Appeals held the instruction given to be correct, citing *United States v. Cashio*, 5 Cir., 1970, 420 F. 2d 1132.

In *Edgington v. United States*, 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467, in an opinion by Mr. Justice Shiras, it was stated:

> "The circumstances may be such that an established reputation for good character if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." 164 U.S. at 366.

In *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168, Mr. Justice Jackson commented on *Edgington*, stating:

> "This privilege (to present character evidence) is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed." 335 U.S. at 476, 69th S. Ct. at 219.

---

[3] "Evidence of a Defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of a crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character and respect to those traits would commit such a crime."

[4] "(character) evidence should be considered by you along with all of the other evidence in the case relating to any particular count, you have a reasonable doubt as to the defendant's guilt thereunder, you must acquit him."

The Circuit Court of Appeals are, and have been for many years, in conflict as to what type of charge is required by *Edgington* and *Michelson*. The Seventh and District of Columbia Circuits hold that the "standing alone" charge must be given when character evidence is admitted.[5] The Tenth Circuit holds that the "standing alone" charge does not have to be given in every case, but does have to be given where the prime defense is based on character evidence.[6] The Second, Third, Fourth, Fifth, Sixth, Eighth and Ninth Circuits hold that the "standing alone" instruction does not have to be given.[7]

The defense in the present case was entrapment. Thus, the only issue in controversy was in whose mind did the criminal intent arise — the undercover agent's or Dr. Ramzy's. The character testimony indicated that the doctor had a good reputation, both professionally and as a peaceful and law abiding citizen. This testimony, when considered with all the testimony presented in the case, could have been sufficient alone to raise a reasonable doubt in the minds of the jurors. The failure of the trial court to give the "standing alone" charge in effect denied him the total impact of his defense of entrapment.

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[5] *United States v. Wicoff*, 7 Cir., 1951, 187 F. 2d 886; *Villaroman v. United States*, D.C. Cir., 1950, 184 F. 2d 261.

[6] *Swingle v. United States*, 10 Cir., 1968, 389 F. 2d 220.

[7] *United States v. Fayette*, 2 Cir., 1968, 388 F. 2d 728, *United States v. Klass*, 3 Cir., 1948, 166 F. 2d 373; *Hoback v. United States*, 4 Cir., 284 F. 529; *Moore v. United States*, 5 Cir., 1958, 254 F. 2d 213; *United States v. Brown*, 6 Cir., 1965, 353 F. 2d 938; *Black v. United States*, 8 Cir., 1962, 309 F. 2d 331 (but see *Gross v. United States*, 8 Cir., 1968, 394 F. 2d 216); and *Carbo v. United States*, 9 Cir., 1963, 314 F. 2d 718.

Petitioner strongly contends that the "standing alone" charge has to be given in the proper case pursuant to *Edgington* and *Michelson*, and that the facts of this case show conclusively that this case is a proper case as contemplated by the Supreme Court.

The Petitioner further contends that the conflict of decisions in the circuit court of appeals requires that this Court effectively resolve the issue. As stated in *Edgington* and *Michelson*, character evidence is a valuable and important aid to the defense of a person accused of a crime. To deny the full use of character evidence where, in a proper case, it may alone create reasonable doubt, is a denial of due process of law.

C.

Jacksboro Police Officer Epps and Neal Pierce[8] were witnesses deeply connected with the beginnings of this case. Officer Epps began the investigation of alleged drug sales in the Jacksboro, Texas, area by apparently taking some pills from Neal Pierce. Pierce was supposed to make purchases from the Petitioner, and attempted to do so for two months before the undercover agent arrived on the scene. Pierce was used by the undercover agent to set up a meeting with the Petitioner.

The sole issue involved in this case was where the criminal intent arose, in Dr. Ramzy's mind or in the undercover agent's mind. If, as stated by Dr. Ramzy in his testimony,

[8] Both witnesses were present for the trial, but neither were called to testify.

improper inducements were made by the agents of the government (Epps and Pierce were provided with government funds to purchase drugs from the doctor, and both were present when Pierce arranged the meeting between Dr. Ramzy and the undercover agent), the defense of entrapment is available. *Buie v. United States*, 2 Cir. 1969, 407 F. 2d 905; *Johnson v. United States*, D.C. Cir., 1963, 317 F. 2d 127.

An objection was made to the trial court's failure to instruct the jury that the failure of the government to call Epps and Pierce, witnesses peculiarly within the control of the government, should result in a presumption that the testimony, if given, would not be favorable to the government. The trial court and the Circuit Court of Appeals rejected the objection, the Circuit stating:

> " * * * At best the testimony of these witnesses would have been remote and cumulative of other evidence, and in any event they were available to the defendant and could have been called to testify had he so desired."

Prior to the present case, the Fifth Circuit had held that the "availability" of a witness is not to be determined from his mere physical presence at trial or his accessibility for service by subpoena; rather, availability may well depend, among other things, upon the witness' relationship to one or the other parties and the nature of the testimony he might be expected to give. *McClanahan v. United States*, 5 Cir., 1956, 230 F. 2d 919, 926; *United States v. Chapman*, 5 Cir., 1970, 435 F. 2d 1245. The general principle was stated in

Graves v. United States, 150 U.S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1894):

> " * * * The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption the testimony, if produced, would be unfavorable. * * * " .

The Second, Third, Sixth and Ninth Circuits agree that presence alone is not availability.[9]

Since it is obvious that the two witnesses were within the control of the government and the record indicates that there were contacts and attempted purchases prior to the arrival of the federal undercover agent, it is also obvious that the testimony of these two witnesses would elucidate the issue of predisposition, the primary issue in a case where entrapment is the defense. Further, the ruling by the circuit court that the witnesses were available to the defendant is in conflict with decisions in four other circuits.

REASONS FOR GRANTING WRIT

Petitioner's first contention as to his right of discovery is an important question which affects every criminal case tried in federal courts. Although this Court has never directly decided the issue, the Supreme Court Opinions cited indicate that defense counsel should have the right to determine the relevance to the defense of the government's investigation unless there are compelling reasons to the con-

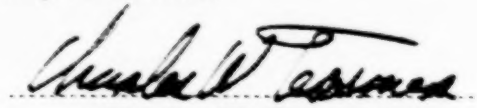
[9] *United States v. Beekman*, 2 Cir., 1946, 155 F. 2d 580; *United States v. Restaino*, 3 Cir., 1966, 369 F. 2d 544; *Morei v. United States*, 6 Cir., 1942, 127 F. 2d 827 and *Samish v. United States*, 9 Cir., 1955, 223 F. 2d 358.

trary. Petitioner's second and third contentions involve points of law which not only are important as to the specific fact situation but also indicate a conflict between the decisions of the court of appeals and between decisions of the Supreme Court and the court of appeals.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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Appendix A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 31136
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL OSLIN RAMZY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

(July 16, 1971)

Before BROWN, Chief Judge, INGRAHAM, and RONEY, Circuit Judges.

BROWN, Chief Judge: Dr. Carl Ramzy, convicted of three separate unlawful sales of depressant and stimulant drugs in violation of 21 U.S.C.A. § 331 (q) (2), was sentenced to concurrent fifteen month prison terms. Finding no merit in any of his allegations of error, we affirm.

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F. 2d 409.

Appellant first contends that his status as a doctor of medicine required the indictment to expressly negate the statutory provision exempting "practitioners licensed by law to prescribe or administer depressant or stimulant drugs, while acting in the course of their professional practice."[1] However, under the facts of the case it was clearly the defendant's burden to prove as an affirmative defense that his conduct fell within the legislative exception, and there was no necessity for the indictment to allege that it was not. *McKelvey v. United States*, 1922, 260 U.S. 353, 357, 43 S.Ct. 132, 134, 67 L.Ed. 301, 304; *Tritt v. United States*, 10 Cir., 1970, 421 F. 2d 928, 929-30; *Hockenberry v. United States*, 9 Cir., 1970, 422 F. 2d 171, 173.

Appellant next claims that entrapment was proven as a matter of law because there was no evidence of his predisposition to commit the offenses. We find this contention unpersuasive in light of the testimony of two narcotics agents that Dr. Ramzy was ready and willing to sell when an offer was made, that he justified his high price by stating "there is a lot of risk involved and I won't sell it unless I can make money on it," and that he initiated one of the sales himself by inviting the agent to call him. The jury, following clearly correct instructions from the Court, might have not unreasonably concluded from this and other testimony that the defendant was an ensnared criminal rather than an innocent victim, and we cannot view the evidence to be so clear-cut as to preclude such a finding.

Nor is there any real substance in the allegation that the Trial Court's instruction to the jury on the entrapment issue was fatally defective because it did not apply the law to the facts and failed to define "inducement" in other than general terms. More accurately, the Judge merely refused to explicitly submit the defensive theory that Dr. Ramzy was coerced into making the sales by the agents' alleged threats of professional ruin and economic loss. The meaning of the term "inducement" is so self-evident that the jury must have

[1] 21 U.S.C.A. § 360a(a) (4). This provision was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, § 701(a), effective October 27, 1970.

interpreted it to include such threats, even without an explicit instruction to that effect, and we cannot conclude that the failure to submit appellant's theory in its entirety was error.

Moreover, appellant merely reorchestrates the same theme by challenging the refusal of a requested instruction on the defense of "economic coercion." Apart from the fact that this is essentially the same attack under a different label, the defense of economic coercion is available only to negative specific intent. When, as here, such intent is not a necessary element of the offense charged, the defense is unavailable. *United States v. Barash*, 2 Cir., 1966, 365 F. 2d 395, 402, *following reversal*, 1969, 412 F. 2d 26, *cert. denied*, 396 U.S. 832, 90 S.Ct. 86, 24 L.Ed. 2d 82.

The Trial Court also refused a requested instruction to the effect that the defendant's evidence of good character, standing alone, was sufficient to raise a reasonable doubt as to guilt. Instead, the Court instructed that the jury should acquit if character evidence along with all other evidence in the case created a reasonable doubt as to the defendant's guilt. Such an instruction is plainly consistent with our holding in *United States v. Cashio*, 5 Cir., 1970, 420 F. 2d 1132.

An attack on the refusal to instruct on the presumption arising from the government's failure to call witnesses is likewise without merit. At best the testimony of these witnesses would have been remote and cumulative of other evidence, and in any event they were available to the defendant and could have been called to testify had he so desired.

The claim that error resulted from the exclusion of defense testimony regarding a conversation that took place a few days after the defendant's arrest borders on the frivolous, since it was clearly inadmissible hearsay.

Finally, we reject the argument that the defense was prejudiced by the denial of access to a small portion of the government's file. The Trial Court, in fact, was extraordinarily generous in its allowance of discovery, and after ex-

amining the excluded material we have found that it contains nothing that could possibly have materially aided the defendant in the prepartion of his case.

AFFIRMED.

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Appendix B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM. 1970

No. 31136
SUMMARY CALENDAR

D. C. DOCKET NO. CR 4-830

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL OSLIN RAMZY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 16, 1971

Issued As Mandate:

Appendix C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 31136
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL OSLIN RAMZY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

(September 9, 1971)

ON PETITION FOR REHEARING

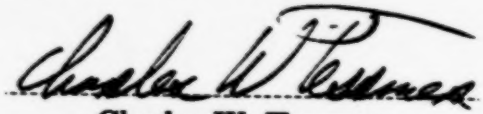
Before BROWN, Chief Judge, INGRAHAM, and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 1971, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C., 20530. I further certify that all parties required to be served have been served.



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In the Supreme Court of the United States

OCTOBER TERM, 1974

CARL OGLE RAMEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-493

CARL OSLIN RAMZY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1971. A petition for rehearing was denied on September 9, 1971. On October 6, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to instruct the jury that the failure of the government to call certain witnesses should result in an inference that their testimony would have been unfavorable to the government.

2. Whether the trial court's instruction concerning the weight to be given evidence of good character was proper.

3. Whether petitioner was prejudiced by the limitations placed on his access to the government's file.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of three counts of unlawful sale and delivery of depressant or stimulant drugs in violation of 21 U.S.C. (Supp. v) 331(q)(2). Petitioner was sentenced to imprisonment for a term of fifteen months on each count, the sentences to run concurrently. The court of appeals affirmed the convictions (Pet. App. A).

At trial, the government's chief witness was Alan Caraway, an undercover agent with the Bureau of Narcotics and Dangerous Drugs. He testified that on October 1, 1969, he and A. P. Epps, a local police officer, had informant Neal Pierce arrange by telephone a meeting between petitioner and Caraway (Tr. 104-105, 169-172, 220-221).[1] At this meeting petitioner, a phy-

[1] "Tr." designates the three volume trial transcript which we are filing herewith.

sician, sold Agent Caraway a quantity of amphetamines (Tr. 110-111). Caraway also testified that he returned to petitioner's office on October 21, 1969, purchased a number of pills and discussed the possibility of a larger transaction at some future date (Tr. 125-128, 192-195). In the months following these initial sales, the agent maintained contact with the petitioner relative to the larger purchase (Tr. 134-135, 141-144). On May 13, 1970, Caraway, accompanied by another agent of the Bureau of Narcotics and Dangerous Drugs, visited petitioner's residence to transact another sale (Tr. 147, 246). On this occasion, after petitioner had transferred possession of a quantity of drugs to the agents, he was arrested (Tr. 148, 250-251).

Petitioner's basic trial defense was entrapment. He testified that he had sold or delivered controlled drugs to the government agent on October 2, 1969 (Tr. 425, 502, 506-507), and on October 21, 1969 (Tr. 425, 502, 510-512), but denied that any transfer took place on May 13, 1970 (Tr. 425, 512). Petitioner testified that the sales resulted from his being contacted by Neal Pierce; that Pierce had contacted him several times in an attempt to purchase drugs for a friend, but on each occasion petitioner had refused to sell any drugs (Tr. 442); and that he finally agreed to meet with Pierce's friend for the sole purpose of stopping Pierce's persistent phone calls (Tr. 447). At the ensuing meeting, petitioner testified that the prospective purchaser (agent Caraway) threatened to reveal an alleged prior drug sale if petitioner did not sell him a quantity of pills (Tr. 449). Petitioner testified that he was

intimidated by these threats and reluctantly agreed to the sales (Tr. 426, 450).

ARGUMENT

1. Petitioner contends that the trial judge erred in not instructing the jury that the government's failure to call police officer A. P. Epps and Neal Pierce raised an inference that such testimony would have been unfavorable to the government.[2] But Pierce did not participate in the sales; he merely arranged by telephone for the preliminary meeting between the government undercover agent and petitioner on October 1, 1969 (Tr. 104-105). The substance of these telephone calls was brought out during Agent Caraway's testimony (Tr. 169-172, 220-221). Since Pierce's testimony on this issue would have been merely cumulative, no negative inference arises from the failure of the government to call him as a witness. *United States* v. *Tant*, 412 F. 2d 840 (C.A. 5), certiorari denied, 396 U.S. 876.

The record does not disclose the role played by Officer Epps in the investigation leading to the sales and petitioner's arrest. Nor did petitioner's counsel at the trial suggest what, if any, special information relevant to the case was possessed by that officer. Surely absent a showing that Officer Epps' testimony would have further elucidated the transaction, there was no basis for a presumption that the witness' testimony would have been unfavorable to the government. *Wynn* v. *United States*, 397 F. 2d 621, 625 (C.A. D.C.).

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[2] Both were present at the trial but were not called by either side.

2. Petitioner called a number of witnesses who testified to his good reputation. The trial judge instructed the jury (Tr. 684-685):

> The defendant has offered evidence here as to his good professional reputation and his reputation for being a peaceable, law-abiding citizen. That evidence should be considered by you along with all of the other evidence in the case. If, taking into consideration all of the evidence in the case relating to any particular count, you have a reasonable doubt as to the defendant's guilt thereunder, you must acquit him.

The court refused to instruct, as requested by petitioner, that evidence of good character, standing alone, may be sufficient to give rise to a reasonable doubt of guilt. Relying upon *Edgington* v. *United States*, 164 U.S. 361, and *Michelson* v. *United States*, 335 U.S. 469, petitioner argues that the "standing alone" instruction was required. Both those decisions state that in some circumstances evidence of good character may alone create a reasonable doubt without particularizing when those circumstances exist. As petitioner points out (Pet. 8), the circuit courts are not in agreement as to whether such an instruction must be given in any case where evidence of good character is adduced. All the courts of appeals which have been presented with the issue, other than the District of Columbia [3] and possibly the Seventh Circuit [4] now hold that an instruction

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[3] *Villaroman* v. *United States*, 184 F. 2d 261, 263 (C.A. D.C.).

[4] See *United States* v. *Wicoff*, 187 F. 2d 886, 890 (C.A. 7).

such as that given here is sufficient, particularly where good character is not the sole basis for the defense. See *United States* v. *Cashio,* 420 F. 2d 1132, 1135 (C.A. 5), certiorari denied, 397 U.S. 1007; *Oertle* v. *United States,* 370 F. 2d 719, 726-727 (C.A. 10), certiorari denied, 387 U.S. 943. This Court has not previously deemed it necessary to reconcile the differences among the circuits on this matter, and there is no need to do so now. Petitioner admitted the sales involved and relied primarily on the defense of entrapment to which his character evidence was incidental.

The "standing alone" instruction would have inappropriately focused the jury's attention on but one aspect of the defense. See *Smith* v. *United States,* 305 F. 2d 197, 206-207 (C.A. 9), certiorari denied, 371 U.S. 890.

3. The district court allowed petitioner's attorney to examine the government file except for material deemed to be pertinent to other persons under investigation (Tr. 203-204). The trial court made an *in camera* review of the excised portions and granted petitioner access to some of the withheld contents. Petitioner argued that defense counsel is the only party capable of determining what material is relevant to the defense and that failure to allow counsel to inspect the file amounted to a denial of due process. There is nothing in the holding of *Brady* v. *Maryland,* 373 U.S. 83, upon which the petitioner relies, that requires a complete disclosure of the government's file. See *Hemphill* v. *United States,* 392 F. 2d 45, 48 (C.A. 8). The trial court found nothing in the remain-

ing portion of the government's file favorable to the petitioner. The court of appeals, after examining the material, reached the same conclusion (Pet. App. 15-16). Further review of this factual issue is not warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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